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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

—v.—

MINNESOTA NEWSPAPER ASSOCIATION, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF NATIONAL ADVERTISERS IN SUPPORT OF APPELLEE

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

GILBERT H. WEIL
60 East 42nd Street
Suite 4210
New York, New York 10165
(212) 687-8573

Attorneys for *Amicus Curiae*

QUESTIONS PRESENTED

1. Does the combined effect of Congress' enactment of the Charity Games Advertising Clarification Act of 1988 (Pub. L. No. 100-625) (Nov. 7, 1988) and appellee's assertion that a live controversy no longer exists render it inappropriate for the Court to consider the merits?

2. Should 18 U.S.C. 1302 be construed to authorize the Postmaster to exclude truthful communications from the mails when the communications relate to activity that is lawful both at the point of mailing and the point of receipt?

3. If 18 U.S.C. 1302 is construed to authorize the exclusion of such communications from the mails, does the statute violate the First Amendment, as well as fundamental principles of cooperative federalism?

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INTEREST OF AMICUS CURIAE[1]

The Association of National Advertisers, Inc., (A.N.A.) is an organization devoted to the advancement of truthful advertising as a means of fostering the capacity of individual Americans to make informed and autonomous choices concerning lawful economic options. A.N.A.'s members place more than 80% of all national and regional advertising in the United States. A.N.A. believes that government's only legitimate role in the in the regulation of commercial advertising is to assist consumers in receiving truthful information relevant to the making of informed, autonomous choices among

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[1]The parties have consented to the filing of this brief. Pursuant to Rule 36.2, letters of consent are being filed with the Clerk of the Court.

lawful products and services. Amicus believes that attempts by well-meaning government officials to go beyond that important role and to use advertising regulation as a back-door method of manipulating consumer choice are both inconsistent with the postulates of a free society and violative of the First Amendment. The attempt in this case to bar truthful speech concerning lawful economic options from the mails poses difficult and far-reaching issues of federalism, free speech and statutory construction. A.N.A. respectfully submits this brief amicus curiae in the hope that it will aid the Court in its analysis.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in the brief of the Minnesota Newspaper Association.

SUMMARY OF ARGUMENT

Since the Solicitor General concedes that 18 U.S.C. 1302 cannot be invoked against news columns or editorial comment; and since Congress has removed the restrictions on newspaper advertising of lawful charitable gaming, the only issue remaining in this case involves the direct mailing of prize lists. The absence of any party with an interest in engaging in such direct mailing renders it inappropriate to consider the applicability of 18 U.S.C. 1302 to such direct mail practices.

If the Court chooses to reach the merits, 18 U.S.C. 1302 should be construed narrowly, in accordance with the assumptions of its enactors, to exempt truthful speech concerning behavior that is lawful at the point of mailing and the point of receipt.

If the Court construes 18 U.S.C. 1302 to authorize the Postmaster to ban truthful speech about lawful activity, the statute violates the First Amendment. The prize lists at issue herein cannot be characterized as commercial speech because the speakers' interests; the messages' contents; and the hearers' interests are far broader than the narrow decision whether to enter into a discrete commercial transaction. Moreover, even if the speech is characterized as "commercial", it cannot be suppressed under the four-part Central

Hudson test. The federal government does not have a "substantial interest" in deterring speech about activity deemed lawful under the consensus police power judgments of the States. Indeed, given this Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), such an interest in censorship cannot even be called "legitimate". In addition, the government's interest in deterring organized crime in this context - if such an interest survived the passage of Pub. L. 100-625 - would not be "directly advanced" by banning prize lists mailed by regulated state charities. Moreover, both asserted governmental interests - assuming they survive Bigelow and Pub. L. 100-625 - can be equally advanced without resorting to censorship - by blocking mail only to those few States where all gambling is unlawful; and by

supervising charitable gaming to guard against infiltration by organized crime. Finally, when, as here, government competes economically with private entities, government may not award itself a competitive advantage by censoring the speech of its private competitors, while simultaneously exploiting a self-awarded information monopoly.

ARGUMENT

18 U.S.C. 1302 MAY NOT BE APPLIED TO BAN TRUTHFUL SPEECH FROM THE MAILS CONCERNING ACTIVITY THAT IS LAWFUL AT THE POINT OF MAILING AND THE POINT OF RECEIPT

A. The Precise Issue Raised By This Appeal

The unfortunate procedural history of this appeal has generated confusion concerning the precise issues before the

Court. The almost total absence of a factual record; the questionable decision by the District Court to couch its analysis in facial terms; the shifting nature of the legal landscape caused by Congress' repeal of the operative restrictions as of 1990; the attempt by appellee to withdraw from the litigation because Congress has adequately responded to its concerns; and the Solicitor General's attempt to force a continuation of this appeal in an effort to revive the prize list clause of 18 U.S.C. 1302 for possible future use against unlawful gambling activity, have resulted in complex briefs discussing a host of abstract issues, including: (1) the amorphous dividing line between commercial and non-commercial speech; (2) the degree of protection available to commercial speech; (3) the ill-defined relationship

between the federal government's delegated powers under the postal and commerce clauses and the States' reserved police powers; (4) the federal government's power to ban unlawful or obscene speech from the mails; and (5) the potential relationship between interstate lotteries operated by profit-making commercial entities and organized crime.

Lost in the welter of abstractions and hypothetical applications of 18 U.S.C. 1302, however, is the fact that this "case or controversy" involves the mailing of Minnesota newspapers to subscribers, the vast bulk of whom reside in Minnesota, containing information about lawful gaming activities by Minnesota charities. Thus, the case does not implicate the government's power to use 18 U.S.C. 1302 to exclude information about unlawful gambling

from the mails.

Moreover, given Congress' enactment of the Charity Games Advertising Clarification Act of 1988, the case does not even raise the question of whether the federal government possesses power to block the flow of speech about economic activity that is lawful in the sending state, but unlawful in the receiving state.[2] Compare, Bigelow v. Virginia, 421 U.S. 809 (1975) with Smith v. United States, 431 U.S. 291 (1977).

On the sparse record below, the only issue before the Court is whether 18 U.S.C. 1302 may be applied to bar the mailing of truthful information concerning lawful gaming activity by Minnesota charities to willing recipients, the vast bulk of whom

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[2]Amicus believes strongly that, under Bigelow, no such power exists. See infra, at 38-40.

are Minnesota residents. Such a mailing may occur in three contexts: (1) the mailing of a Minnesota newspaper containing news or editorial comment about charitable gaming; (2) the mailing of a Minnesota newspaper containing paid advertisements concerning charitable gaming; and (3) the mailing of prize lists or other descriptive material by a Minnesota charity directly to a willing recipient.

The Solicitor General concedes, as he must, that 18 U.S.C. 1302 cannot possibly be applied to ban the mailing of news or editorial comment. Moreover, Congress, by enacting the Charity Gaming Advertising Clarification Act of 1988, has eliminated 1302 as a bar to newspaper advertisements for lawful charitable gaming. Thus, the only remaining legal issue posed by this appeal is whether 18 U.S.C. 1302 may be

applied to direct mail communications between a Minnesota charity engaged in lawful charitable gaming and willing addressees, most of whom reside in Minnesota.

Amicus believes that the absence from this litigation of any party with an interest in engaging in direct mail communication is fatal to the Court's jurisdiction to pass on the direct mail issue. E.g. City of Los Angeles v. Lyons, 461 U.S. 95 (1983); United States v. Raines, 362 U.S. 17, 21 (1960).[3] If,

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[3]While this Court has permitted litigants to raise the rights of absent third persons in free speech cases, it has done so only in settings where it would otherwise be difficult to assure the protection of third-party rights. E.g. NAACP v. Alabama, 357 U.S. 449 (1958); Broadrick v. Oklahoma, 413 U.S. 601 (1973). No such concern attaches to the ability of Minnesota charities to protect their own rights. Indeed, the express reluctance of appellee to act as surrogate for the Minnesota charities in this Court counsels

however, the Court deems it appropriate to reach the merits,[4] amicus believes that truthful information about lawful gaming activity may not be barred from the mails under 18 U.S.C. 1302 because the statute should not be construed to apply to truthful information concerning activity that is lawful both at the point of mailing and the point of receipt;[5] and because, if

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strongly against proceeding on a ius tertii analysis.

[4]Since the Congressional repeal of the advertising ban will not take effect until 1990, the Court possesses technical jurisdiction over the facial aspects of the District Court's opinion. Given appellee's willingness to await the effective date of the statute, however, no need to reach the merits exists.

[5]The vast bulk of potential addressees herein reside in Minnesota. Moreover, since most states now permit significant forms of gambling, especially by charities, even mail addressed out of state will, generally, involve activity that is lawful at the place of receipt. The possibility that a relatively small number of letters will be addressed to the few states that

the statute is deemed applicable, it would violate fundamental principles of federalism and free speech.

B. The Federal Postal Power, the State Police Power and the First Amendment

The resolution of legal issues posed by attempts to exclude communications from the mails that are both lawful and truthful turns on the interplay of three constitutional concepts; (1) the grant of power under Article I, Section 8 to Congress "to Establish Post Offices and Post Roads"; (2) the decision to vest the police power exclusively in the States; and (3) the restraints placed on the exercise

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ban all gambling cannot be permitted to block the transmission of wholly lawful messages to residents of the remaining states. Indeed, it is doubtful whether censorship can ever be used to block residents of one state from learning about activity that is lawful in a sister state. See infra at 38-40.

of both federal and state power by the First and Fourteenth Amendments.

When the predecessor to 18 U.S.C. 1302 was enacted in the latter part of the 19th century, all three constitutional concepts supported a broad power to ban communication concerning gambling from the mails. The postal power was viewed as a broad charter to exclude material from the mails that was contrary to the public interest. Public Clearing House v. Coyne, 194 U.S. 497 (1904). Thirty-nine of the forty-two then existing states forbade lotteries altogether. S. Rep. No. 537, 98th Cong., 2d Sess. 3 (1984); S. Rep. No. 1579 , 51st Cong., 1st Sess. 1 (1890). And the First Amendment had not yet been developed into a significant force for the protection of free expression. E.g. Davis v. Massachusetts, 167 U.S. 43 (1897);

Patterson v. Colorado, 205 U.S. 454 (1907). Most importantly, federal statutes banning speech about gambling from the mails were quite properly viewed as exercises in cooperative federalism, pursuant to which the federal government deployed its postal power to reinforce the consensus police power judgments of the several States by banning speech from the mails that was generally unlawful. Not surprisingly, therefore, federal statutes excluding speech about gambling from the mails were upheld in Ex parte Jackson, 96 U.S. 727 (1877) and In re Rapier, 143 U.S. 110 (1892) as classic examples of cooperative federalism that did not raise serious free speech issues. See alsc Champion v. Ames, 188 U.S. 321 (1903).

A century later, however, all three constitutional concepts point in the

opposite direction. First Amendment protections, especially in the postal area, now preclude the federal government from transforming the postal power into a general power to censor. E.g. Lamont v. Postmaster General, 381 U.S. 301 (1965); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). Despite the Solicitor General's unfortunate evocation of dictum in Public Clearing House v. Coyne, supra, the postal power is no longer viewed as a general license to exclude speech from the mails on amorphous public policy grounds. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946). See also, Manual Enterprises v. Day, 370 U.S. 478 (1962). Moreover, forty-five states now have exercised their police powers to permit gambling, especially by charities as a device to raise funds for eleemosynary activities. Thirty-six states

permit betting on horse races. Twenty-eight states now actually operate - and aggressively promote - state lotteries. S. Rep. No. 537, supra; S. Rep. 100-446, p.11-12, 9A U.S. Code, Cong. & Ad. News (1988), pp. 3081-82. Thus, when 18 U.S.C. 1302 is invoked today by the federal government to bar the mailing of truthful speech about charitable gaming - an activity that has now been deemed lawful under the consensus police power judgments of the States - it can no longer be characterized as an exercise in cooperative federalism. Rather, it is more properly viewed as an ill-considered attempt by federal postal officials to overrule the consensus police power judgments of the States concerning charitable gaming. As such, it transmutes the postal power into a forbidden national police power. Maryland v. Wirtz, 392 U.S.

183, 197 n. 27 (1968) (Harlan, J.). Moreover, when, as here, such a de facto national police power is used to censor truthful information about lawful activity in an effort to manipulate local behavior, the statute not only violates principles of federalism, it flatly contradicts the First Amendment. Bigelow v. Virginia, 421 U.S. 809 (1975).

C. Properly Construed, Neither The Prize-List Clause Nor The Advertisement Clause of 18 U.S.C. 1302 Authorizes The Postmaster To Interfere With The Mailing of Truthful Speech About Behavior That Is Lawful At The Point Of Mailing As Well As The Point Of Receipt

The Solicitor General argues that the prize list clause of 1302 precludes Minnesota charities from mailing prize lists directly to willing recipients, even

if they reside in Minnesota or in one of the forty-four other States that permit forms of gambling. Such a broad reading of 1302 - authorizing the Postmaster to censor mail concerning behavior that is lawful at the point of mailing and the point of receipt - raises difficult and far-reaching constitutional questions. If a plausible reading of the statute exists that would avoid those constitutional questions, this Court has repeatedly recognized the wisdom of adopting it. E.g. Lowe v. S.E.C., 472 U.S. 181 (1985); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, ____ U.S.___ ,108 S. Ct. 1392 (1988). Precisely such a plausible narrowing construction emerges from the Solicitor General's assertion that the overriding purpose of 1302 is to prevent the erosion of the police power judgments

of those States that have chosen to ban all gambling.

Given this Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), it is extremely doubtful whether any organ of the government - state or federal - can invoke censorship to prevent citizens of one state from learning about activity that is lawful in a sister state. Even if one assumes, however, that such a dangerous power is subsumed in the postal power, it can have no application in settings where the subject of the communication is lawful both at the point of mailing and point of receipt.

When the predecessor of 1302 was enacted in 1886, gambling was forbidden in virtually every state except Louisiana. Thus, in the eyes of the legislators who enacted 1302, the statute could not have

had a significant application to activity that was lawful at the point of mailing and the point of receipt. Such a shared legislative assumption as to the statute's reach should, amicus suggests, be respected by construing 1302, at a minimum, to apply to speech only when its subject is unlawful at either the point of mailing or receipt, especially since such a narrowing construction would minimize the constitutional issues raised by the statute.[6] See generally, Calabresi, A Common Law for the Age of Statutes, (1982).

In Lowe v. S.E.C., supra, for example, this Court construed the exemption for bona fide newspapers in the Investment Adviser's

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[6]Such a construction would not wholly eliminate the statute's constitutional difficulties, since, given Bigelow, censorship may not be used to block citizens of one State from learning about activity that is lawful in another State.

Act of 1940 broadly to include virtually all investment newsletters in order to avoid serious free speech issues. Similarly, in DeBartolo, this court viewed a proviso to the National Labor Relations Act as reflecting a general Congressional intent to permit analogous labor speech in order to avoid a difficult First Amendment question. This Court should similarly read 1302 narrowly to give effect to the contemporaneous assumptions of its enactors concerning its reach, thereby advancing the statute's purpose and enhancing its constitutionality.[7]

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[7] Smith v. United States, 431 U.S. 291 (1977) does not foreclose such a common sense construction.

In Smith a prosecution for mailing obscene matter in Iowa was sustained despite the fact that the mailing was intrastate at a time when Iowa had no law barring the sale of obscene material to adults. Smith is, however, distinguishable on two levels.

D. If 18 U.S.C. 1302 Is Construed To Apply To Truthful Information Concerning Activity That Is Lawful At The Point Of Mailing And The Point Of Receipt, The Statute Violates The First Amendment And Is Inconsistent With General Principles Of Federalism

The Solicitor General argues that 18 U.S.C. 1302 authorizes the Postmaster to

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First, the hiatus in Iowa obscenity laws was not attributable to an exercise of Iowa's police power judgment to permit obscenity. Rather, Iowa's obscenity law had been judicially invalidated in 1973 and was not re-enacted until 1976 because of disagreements over wording.

Second, the content of the mailing - hard core obscenity - was not deemed to be speech at all under this Court's traditional approach to the area and was, thus, entitled to no First Amendment protection, regardless of its treatment under state law. Roth v. United States, 354 U.S. 476 (1957).

The Smith case, therefore, posed neither a difficult federalism, nor an insuperable First Amendment, issue.

block a truthful communication between a Minnesota charity and a willing Minnesota listener because the communication concerns lawful charitable gaming activity. Such an outdated conception of the postal power poses a dramatic threat to our system of free expression. Given the importance of the mail as a medium of communication, it is not surprising that the evolution of First Amendment doctrine is closely intertwined with the placing of limits on the postal power.

The modern history of the First Amendment begins with Learned Hand's landmark refusal to permit the Postmaster to use the postal power to bar material from the mails by denying it third class mailing status. Masses v. Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd 246 F. 24 (2d Cir. 1917). See

Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719 (1975). The articulation of the "clear and present danger" test occurred in the context of a criminal prosecution for mailing anti-draft material to prospective draftees. Schenck v. United States, 249 U.S. 47 (1919). One of Justice Holmes' initial attempts to liberate free speech protection from the constraints of the "bad tendency" test occurred when the Postmaster revoked the mailing privileges of a newspaper. United States ex rel Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 436-38 (1921) (Holmes, J., dissenting). The first Act of Congress invalidated under the free speech clause of the Constitution authorized the Postmaster to interfere with the delivery of mail to

willing recipients. Lamont v. Postmaster General, 381 U.S. 301 (1965). See also, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Manual Enterprises v. Day, 370 U.S. 478 (1962); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Blount v. Rizzi, 400 U.S. 410 (1971); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).

As Justice Holmes initially argued in dissent almost seventy years ago in Milwaukee Social Democratic Publishing Co., speech that is protected against de jure governmental suppression by the First Amendment cannot be subjected to de facto censorship by excluding it from the mails.

The Solicitor General purports to accept Justice Holmes's formulation, but seeks to avoid its force by arguing that the mailing of a prize list is not

communication entitled to plenary free speech protection, but rather is a form of commercial speech entitled to little, if any, significant First Amendment protection. The Solicitor General is wrong on two levels.

First, his attempt to carve out an enormous slice of communicative activity relevant to economic decision-making and to characterize it as virtually unprotected is both unjustified and dangerous.

Second, his conception of the free speech protection available to commercial speech virtually emasculates the commercial speech doctrine by resurrecting the discredited "bad tendency" test applied by the Court during the 1920's over the dissents of Justices Holmes and Brandeis, rather than the four-part standard of Central Hudson, to measure the scope of

commercial speech protection. E.g., Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925).

(1) The Speech At Issue Qualifies For Plenary Free Speech Protection

The Solicitor General argues that communication loses its claim to plenary free speech protection whenever it "promotes or advances" an ordinary commercial transaction and the speaker "has a direct financial interest in either the transaction or its promotion", whether or not the communication is couched as a traditional commercial advertisement.

The Solicitor General is surely correct in observing that commercial speech and advertising are not coterminous. Much communication that appears in the form of a paid advertisement is entitled to plenary First Amendment protection. New York Times

Co. v. Sullivan, 376 U.S. 254 (1964). Similarly, communication need not be couched as a formal advertisement to constitute an invitation to enter into a proposed discrete commercial transaction. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). However, the extraordinarily broad criteria proferred by the Solicitor General radically expands a narrow category of of speech relating to discrete commercial transactions into a general description of most economically motivated speech. Under the Solicitor General's test, whenever a speaker's motivation for speech is primarily economic, the speech becomes a candidate for government regulation. A labor leader's criticism of management negotiation techniques; an auto-maker's support of highway construction; a

utility's defense of nuclear power; a broker's defense of the stock market; a doctor's objection to socialized medicine - all would, arguably, fall within the Solicitor General's commercial speech net.

As this Court has noted in Central Hudson, it may be appropriate to identify a narrow category of commercial speech entitled to a somewhat diminished First Amendment protection. That category should, however, be defined, not by the broad and amorphous criteria suggested by the Solicitor General, but by reference to the functional underpinnings of free speech protection.

When speech does little more than propose a commercial transaction, it generally involves a speaker whose only interest is the profit motive; a message that is of little or no interest to the

public-at-large; and a hearer whose sole - but highly significant - interest is obtaining information helpful in determining whether to enter into a discrete commercial transaction. Such speech, which is critical to the proper functioning of our economic structure, is subject to narrow government regulation to assure that the hearer's interest in receiving choice-enhancing information is advanced. See generally, Neuborne, Free Speech, Free Markets, Free Choice: An Essay On Commercial Speech, (1987).

Where, however, as here, the speaker's interest is broader than the profit-motive; the message is of interest to the general public; and the hearer's interest is broader than deciding whether to enter into a discrete commercial transaction, expansion of the concept of commercial

speech becomes intolerable.

No persuasive functional argument can be made in favor of treating prize lists sent by Minnesota charities to willing recipients as commercial speech. First, the interest of the charitable speaker is far broader than profit-maximization. Riley v. National Federation for the Blind, __ U.S.___, 108 S. Ct. 2667 (1988). The communications and the lawful charitable gaming activities at issue are integrally related to advancing the eleemosynary interests of the charities themselves. Thus, while solicitations might well be treated as commercial speech if made by an ordinary commercial speaker, the eleemosynary interest of the charitable speaker infuses the communication with plenary First Amendment protection. Compare Ohralik v. Ohio State Bar Ass'n,

436 U.S. 447 (1978) with In re Primus, 436 U.S. 412 (1978). See also, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Second, the message is of interest to the general public. The fact of a prize winner; the nature of the prize; and the identities of the winners are of substantial interest to the public at large, regardless of whether individual hearers actually choose to gamble. The strong public fascination with news about the prizes and winners of state run lotteries demonstrates that the content of the message elicits interest from the public at large and cannot be treated as a narrow communication of interest only to potential participants in a discrete commercial transaction.

Finally, the hearers' interests in

receiving truthful information that is of substantial informational value in determining their general attitude toward charitable gaming is far broader than merely deciding whether to enter into a commercial transaction. It is precisely in areas that attract significant government regulation that the free flow of information about the regulated behavior is critical to the making of informed political as well as economic judgments. An informed judgment about the appropriate degree of government regulation of charitable gaming cannot be made in the absence of truthful information about how it actually works.

Thus, measured by the identity of the speaker; the nature of the message; and the interests of hearers, direct mail communications between a Minnesota charity

and a willing addressee are entitled to plenary constitutional protection.

(2) The Speech At Issue Is Entitled To Commercial Speech Protection Under The Central Hudson Test

Even if the Solicitor General is correct in characterizing prize lists as commercial speech, the communications are entitled to significant First Amendment protection. This Court has repeatedly recognized that the free flow of truthful information as to lawful products and services, relevant to the making of informed choices by consumers, is entitled to First Amendment protection. E.g. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Carey v. Population Services

Int'l, 431 U.S. 678 (1977); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Central Hudson Gas & Electric Corp. v. Public Service Comm's, 447 U.S. 557 (1980); In re R.M.J., 455 U.S. 191 (1982); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

The motif that unites each of the commercial speech cases has been this Court's commitment to enhancing the hearer's capacity to make an informed and autonomous choice among lawful options. Thus, in those settings where the commercial speech in question did not enhance a hearer's capacity for autonomous choice, either because the choice was unlawful, or the form or content of the message was misleading, the speech was deemed unprotected. Ohralik v. Ohio State

Bar Ass'n, 436 U.S. 447 (1978); Friedman v. Rogers, 440 U.S. 1 (1879); Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations, 413 U.S. 376 (1973).

In Central Hudson, the Court established a four-part test to assure that choice-enhancing commercial speech receives significant constitutional protection. Under the Central Hudson test, so long as commercial speech involves lawful behavior and is truthful, it may be suppressed only if the government demonstrates a "substantial interest" that is "directly advanced" by the regulation and which cannot be equally advanced by less drastic means. See also, Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986).

The Solicitor General argues that censorship of prize lists mailed by Minnesota charities to willing recipients

satisfies the Central Hudson test. In fact, it fails to satisfy even one aspect of the four-part test.

First, the Solicitor General argues that the "substantial interest" test is satisfied by the federal government's interest in preserving the police power judgments of those few remaining states that have chosen to ban charitable gaming. But this Court has already ruled that a State's police power does not include the power to prevent its citizens from learning about an activity that is lawful in a sister state. As Justice Blackmun noted for the Court in his opinion in Bigelow:

> A State...may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, ban a citizen of another state from disseminating information about an activity that is legal in that state.

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> Here, Virginia is really asserting an interest in regulating what Virginians may hear or read about New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders; activities that Virginia's police powers do not reach. 421 U.S. 824; 827-28 (emphasis in original).

Since this so-called "significant governmental interest" asserted by the Solicitor General is explicitly derivative of the State's police power; and since that police power does not include the power to ban speech about activity that is lawful in a sister state, it follows that the asserted governmental interest is not only not "substantial"; it is not even "legitimate".

Moreover, even if, despite Bigelow, the postal power were construed to

authorize an independent federal power to censor in aid of State police power judgments, no such power can be asserted to block the mailing of information concerning activity that is lawful both at the point of mailing and the point of receipt, since the postal power would contradict, not reinforce, the States' police power judgments.

Unlike the situation in Posadas,[8] where Puerto Rico invoked censorship in aid of its own police power judgment, the federal government lacks a national police power. As Justice Harlan noted in Maryland

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[8]It is not necessary to consider the correctness of the Posadas case since the federal government lacks a national police power. Amicus believes, however, that Posadas seriously misapplied the commercial speech precedents of the Court. Proper regard for the underpinnings of the First Amendment should lead the Court to reject attempts to use government information control as a device to manipulate consumer behavior.

v. Wirtz, supra, neither the commerce power nor the postal power can be used to establish a de facto national police power, especially when, as here, the States have reached a consensus that the activity in question is lawful.

Nor does the Solicitor General's alternative "substantial" interest fare better. The Solicitor General argues that the federal government has a substantial interest under the commerce clause in halting the spread of interstate lotteries operated by commercial entities because of potential infiltration of such lotteries by organized crime. However, when measured against a ban on the mailing of prize lists by Minnesota charities, the government's concern with organized crime is less than persuasive. It is difficult to understand how a ban on the mailing of prize lists by

Minnesota charities engaged in charitable fund-raising activity "directly advances" the government's interest in preventing organized crime from infiltrating large, interstate commercial lotteries. In fact, Justice Powell coined the "directly advances" test in Central Hudson in order to guard against precisely such an attempt to invoke Rube Goldberg causation as a justification for censorship. If banning charities from sending prize lists "directly advances" the fight against organized crime, the Central Hudson test will have been drained of virtually all meaning.

Finally, even if one pretended that the government had identified a "substantial interest" that was "directly advanced" by the censorship, it is patently clear that the government's interests are

capable of equally effective protection without resorting to censorship of the mails.

For example, the government's asserted interest in preserving the police power judgments of those states that ban charitable gaming, even if it can be said to have survived Bigelow v. Virginia, supra,[9] is better advanced by selective mail blocks that prevent delivery in those states, but permit mailing and delivery in the 45 states that have evinced a contrary judgment. The government's assertion that it can censor the mail in derogation of the police power judgments of forty-five states in order to preserve the judgment of five is indefensible. Just as an entire category of speech may not be denied to

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[9]Amicus does not believe that such a power exists.

willing hearers merely to shield unwilling hearers, so the citizens of forty-five states may not be denied lawful mail merely to shield five states from unwanted information. Compare, Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) with Rowan v. Post Office Dep't, 397 U.S. 728 (1970). See also, Hynes v. Borough of Oradell, 425 U.S. 610 (1976).

Similarly, the government's asserted interest in impeding the growth of privately operated interstate lotteries as a means of combatting organized crime is equally advanced by strict regulation of charitable gaming. It should not be beyond the combined capability of state and federal authorities to assure that church bingo games do not become a front for organized crime.

Whenever the government seeks to

censor, respect for First Amendment values requires that the government satisfy its significant burden of justification. While the precise size of the burden of justification may vary depending on whether the speech involves politics, religion, science, art or commerce, at a minimum, the government must demonstrate a genuine need to act in derogation of the strong presumption in favor of the free flow of information created by the First Amendment. No such showing can be made in this case.

(3) The Speech At Issue Is Entitled To Protection Under The Non-Discrimination Provisions Of The First Amendment

This Court has repeatedly recognized that attempts to impose differential rules on speakers based upon the content of the speech or the identity of the speaker pose serious dangers to a system of free

expression. E.g. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Arkansas Writer's Project, Inc. v. Ragland, ___ U.S. __, 107 S. Ct. 1722 (1987). Where, as here, Congress has authorized state lotteries to use the mails an an effective means of communicating with willing hearers, it may not deny equal access to private speakers who wish to convey similar messages about equally lawful private activity.

Where government and private entities are engaged in lawful competition, government may not award itself an enormous competitive advantage by rigging the rules governing communication with prospective consumers in favor of the State-run enterprise. All discriminatory speech

rules are dangerous; but discriminatory speech rules designed to benefit government speakers at the expense of competing private speakers are absolutely intolerable. Schacht v. United States, 398 U.S. 58 (1970). See Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

Where, as in Pittsburgh Press, commercial speech concerns unlawful behavior; or, as in Friedman v. Rogers, it is misleading, the speech enjoys no constitutional protection. But where, as here, commercial speech is truthful and describes a lawful consumer choice, the government may not selectively ban the private speech in order to provide a competing government speaker with an information monopoly. Thus, as long as 18 U.S.C. 1307 authorizes state lotteries to

use the mails, private charities engaged in equally lawful behavior may not be denied equal access to a significant method of communicating with the public.

Conclusion

For the above-stated reasons, the appeal should be dismissed for lack of jurisdiction. In the alternative, the decision below should be affirmed.

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Respectfully submitted,

Burt Neuborne
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Gilbert H. Weil
60 East 42nd Street
Suite 4210
New York, New York 10165
(212) 687-8573
Attorneys for Amicus Curiae